

IN THE SUPREME COURT OF MISSISSIPPI

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NO. 2007-CP-01075-COA

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JIMMY D. GILES,

**FILED**  
JAN 28 2008  
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SUPREME COURT  
COURT OF APPEALS

Appellant,

VERSUS

KENNETH I. STOKES,

Appellee.

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REPLY BRIEF FOR THE APPELLANT

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ON APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY  
FIRST JUDICIAL DISTRICT

ORAL ARGUMENT REQUESTED

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JIMMY D. GILES,

Appellant,

VERSUS

KENNETH I. STOKES,

Appellee.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Jimmy D. Giles, Plaintiff/Appellant;
2. Victor I. Fleitas, Attorney for Jimmy D. Giles;
3. Kenneth I. Stokes, Defendant/Appellee;
4. Pieter J. Teeuwissen, Esq., Attorney for Kenneth I.

Stokes;

5. J. Richard Davis, Esq., Attorney for Kenneth I. Stokes.

Respectfully submitted, this the 28th day of January, 2008.

V. Fleitas

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VICTOR I. FLEITAS  
MS BAR NO. 10259

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## REPLY ARGUMENT

1. The Defendant's outside the record assertion that Mr. Giles' is a racist constitutes an *ad hominem* argument.

*Ad hominem* arguments cannot substitute for reasoned debate on the merits of a legal dispute. Simply stated, reliance on an *ad hominem* argument often constitutes the clearest evidence that the party making the argument has a weak case.

The Defendant purposefully makes it a point to open his Brief of Appellee with an outside the record assertion that Mr. Giles is a "self-proclaimed white supremacist," and an outside the record link to a website purportedly supporting this assertion. (Br. of App'ee at 1.) Leaving aside the impropriety of the Defendant making such an assertion when unsupported by the record, the assertion itself has no relevance to the question presently before the Court, whether the trial court erred in refusing to grant leave to amend Mr. Giles' complaint.

Mr. Giles fervently hopes that the Defendant's outside the record and irrelevant assertion was not motivated by a desire to prejudice the Court against him through the assertion that he is a racist. Such *ad hominem* attacks have no place in legal argument and Mr. Giles is confident the Defendant was not motivated by a desire to prejudice the Court against him and that the Court will decide this matter purely on the merits.

2. The Defendants "Statement of Facts" incorrectly recites the factual basis for Mr. Giles' civil action in contravention of Rule 12(b)(6).

When considering a 12(b)(6) motion to dismiss the allegations in the complaint must be taken as true and the motion should not be granted unless it appears beyond doubt that the plaintiff will be unable to prove any set of facts in support of his claim. Sparks v. Kim, 701 So. 2d 1113, 1117 (Miss. 1997). Contrary to the requirement that the allegations in the complaint be taken as true, the Defendant alleges in its "Statement of Facts" that Mr. Giles was an instigator who "launched into loud verbal personal assaults directed primarily at [the Defendant]." (Br. of Appellee at 1.)

In fact, on March 21, 2001, Mr. Giles was recognized to speak for three minutes by the President of the Jackson City Council, Ms. Margaret Barrett. (R. at 15.) While attempting to speak, the Defendant continuously interrupted Mr. Giles in a loud and boisterous manner depriving him of the ability to make his remarks. (Id.) Due to the Defendant's unconstitutional actions, Mr. Giles was escorted from the meeting by police, deprived of his right to speak in a public forum and subsequently maliciously charged with disturbing the peace. (Id.) At his trial on June 8, 2001, Ms. Barrett testified that Mr. Giles was recognized to speak and that the Defendant was out of order. (Id.) The Hinds County Justice Court Judge heard the testimony, viewed a

videotape of the March 6, 2001 meeting and ruled that Mr. Giles was recognized to speak and had a First Amendment right to do so.<sup>1</sup> (Id.) The charges against Mr. Giles were then dropped. (R. at 16.)

3. The filing of a Motion to Amend constituted an appropriate response to the Defendant's Amended Motion to Dismiss.

The Defendant asserts that Mr. Giles' filing of a Motion to Amend his Complaint in response to his Amended Motion to Dismiss was inappropriate. Given the express recognition that a motion to amend a complaint is an appropriate response to a 12(b)(6) motion, even after dismissal, the Defendant's assertion is entirely devoid of merit.

In response to the Defendant's Motion to Dismiss Mr. Giles filed a Response in Opposition to Defendant's Answer, Affirmative Defenses and Motion to Dismiss. (R. at 14-17.) After the Defendant filed its Amended Motion to Dismiss, Mr. Giles filed a written Response in Opposition to Amended Motion to Dismiss (Id. at 27-29), with respect to the Defendant's assertion that the Complaint should be dismissed for failure to prosecute. Mr. Giles simultaneously filed a Motion for Additional Time to Respond to Defendant's Amended Motion to Dismiss. (Id. at 30-

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<sup>1</sup>Thus, the Defendant was fully cognizant of the First Amendment implications in his malicious prosecution of Mr. Giles for exercising his freedom of speech from the date Mr. Giles filed his Response in Opposition to Defendant's Answer, Affirmative Defenses and Motion to Dismiss. (R. at 14-17.)



31.) The trial court then granted Mr. Giles thirty days to secure counsel to further respond to the Amended Motion to Dismiss. (Id. at 33.) Mr. Giles then timely filed his Motion to Amend in response to the Amended Motion to Dismiss. (Id. at 36-43.)

As noted in his Brief for the Appellant, Mr. Giles conceded before the trial court that the dismissal of his Complaint was appropriate unless the court granted the amendment which would then moot the Defendant's Amended Motion to Dismiss. (Tr. at 10.) Rule 12(b) expressly recognizes that a party shall be permitted to amend a complaint, even after granting a dismissal pursuant to Rule 12(b)(6). Consequently, Mr. Giles properly sought leave to amend his complaint prior to the trial court granting the motion to dismiss as a way to respond to the Defendant's 12(b)(6) motion. See Poindexter v. Southern United Fire Ins. Co., 838 So. 2d 964, 970 (Miss. 2003) (holding trial court erred in denying motion to amend and granting motion to dismiss in light of Rule 12(b) mandate that leave to amend shall be granted). This holding applied even where the trial court determined that the proposed amendment would be futile.<sup>2</sup>

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<sup>2</sup>The Defendant now asserts the proposed amendment would be futile, though such an argument was never made to the trial court. The trial court never found that Mr. Giles' proposed amendment would be futile. Regardless, the holding in Poindexter negates any assertion of futility as a basis for denying leave to amend since the right to amend in response to a motion to dismiss is mandatory by operation of Rule 12(b).

Poindexter, 838 So. 2d at 969.

4. The Defendant's assertion that Mr. Giles' proposed amended complaint would not relate back lacks merit.

The Defendant asserts that Mr. Giles proposed amended complaint would not relate back and that consequently the new legal theories proposed would be barred by the statute of limitations. However, because Mr. Giles' proposed amended complaint merely added additional legal theories arising out of the same transaction and event forming the basis for the original complaint the trial court erred in not granting the requested amendment. Frank v. Dore, 635 So. 2d 1369, 1375-76 (Miss. 1994).

The Defendant, relying on Parker v. Mississippi Game & Fish Comm'n, 555 So. 2d 725 (Miss. 1989), goes to great lengths to assert that relation back does not apply because the amended complaint failed the "identity of transaction" test and failed to provide him with notice. The Defendant's reliance on Parker is entirely misplaced. In Parker, the case was decided by the Court's finding that the plaintiff failed to request leave to amend and thus, there was no error in the trial court refusing leave to amend. Parker, 555 So. 2d at 730. Thus, the language in Parker relied on by the Defendant to support his entire argument is pure dicta which runs contrary to the legal authority cited by Mr. Giles, particularly Poindexter.

In addition, as mentioned in his Brief for the Appellant, Mr. Giles' proposed amended complaint arises from the same

transaction provided in his original complaint. Mr. Giles merely added a legal theory for civil rights based on the First and Fourth Amendment, which arose from the fact that he was shouted down at a meeting, prohibited from speaking and maliciously charged simply for exercising his right to speak freely. The Defendant's assertion that Mr. Giles' proposed amendment did not arise from the same events stated in his original complaint is a red-herring.

Further, the Defendant's assertion, that he lacked notice of a potential civil rights claim based on his position as a public official who refused to permit a citizen to speak and criminally charged that citizen for simply seeking to speak at a public meeting, fails the straight-face test.

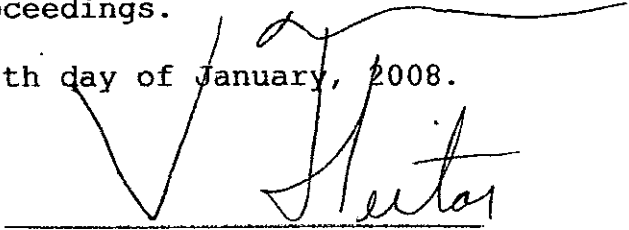
As noted in his Brief for the Appellant, the proposed amended complaint should have been allowed before Mr. Giles' complaint was dismissed because it was based on the same transaction as the original complaint, related back to the filing of the original complaint and was mandatory by operation of the rules of procedure.

#### CONCLUSION

For the reasons stated above, and in his Brief for the Appellant, Mr. Giles requests that this Court find that the trial court abused its discretion in denying him leave to amend his Complaint, reverse the ruling of the trial court and remand this

cause to the trial court for further proceedings.

Respectfully submitted, this the 28th day of January, 2008.

  
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CERTIFICATE OF SERVICE

I, Victor I. Fleitas, attorney for Jimmy D. Giles, do hereby  
certify that I have this day hand-delivered, a true and correct  
copy of the above and foregoing to the following:

Honorable Winston L. Kidd  
Circuit Court Judge  
P.O. Box 327  
Jackson, MS 39205

Pieter Teeuwissen, Esq.  
Office of the City Attorney  
455 East Capitol Street  
Jackson, MS 39205

This the 28th day of January, 2008.

  
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VICTOR I. FLEITAS\_